

***United States Court of Appeals
for the Second Circuit***



APPENDIX

* PLEASE RETURN TO *
* RECORDS ROOM *

77-1335

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

VINCENT JAMES SANTA, JOSEPH DELUCA,
PATRICK DEFILIPPO, JAMES DEFILIPPO,
and MANUEL GOMEZ,

Defendants-Appellants.

Docket No. 77-1335
Docket No. 77-1370

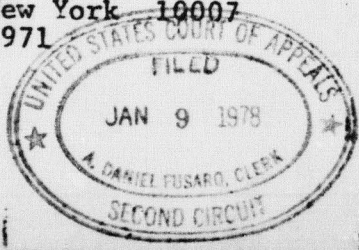
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APPENDIX TO THE BRIEF
FOR APPELLANT JOSEPH DELUCA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESO.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JOSEPH DELUCA
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

STEVEN LLOYD BARRETT,
Of Counsel.



PAGINATION AS IN ORIGINAL COPY

U.S. TITLE SECTION 18:659 OFFENSES CHARGED Theft of goods in i.c.c. ORIGINAL COUNTS 1

BAIL - RELEASE AMT Fugitive Denied Set Pers. Recog. PSA conditions 10% Deposit Surety Bond Collateral 3rd Prty Cust Other

II. KEY DATES & INTERVALS ARREST or U.S. Custody Began High Risk Date Information 1-14-77 INDICTMENT 2/4/77 ARRAIGNMENT Trial Set For 3-21-77 TRIAL Voir Dire 5/16/77 SENTENCE Disposition of Charges 5/25/77

MAGISTRATE SEARCH WARRANT Issued Return Summons Issued Served Arrest Warrant Issued COMPLAINT OFFENSE (In Complaint) DATE INITIAL/NO. INITIAL APPEARANCE DATE PRELIMINARY EXAMINATION OR REMOVAL HEARING WAIVED NOT WAIVED Tape Number OUTCOME DISMISSED HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst. Corcoran ATTORNEYS Legal Aid Defendant X CJA Ret Waived Self None Other PD CD

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
1-14-77		Before CATOGGIO, J - Indictment filed - ordered sealed by the Court.	
1-17-77		Before Mishler, Ch J - case called - Indictment ordered unsealed. This case to be consolidated with 75 CR 762	
1-25-77		Before Mishler, Ch J - case called - Jan. 31, 1977 for pleading.	
1-26-77		By Mishler, Ch J - Writ issued	
2/4/77		Before MISHLER, CH.J. - Case called. Deft arraigned and enters a plea of not guilty. Bail set at \$100,000 Surety Co. Bond. Court appointed Mr. Kelly of Legal Aid to represent, deft. Deft directed to give handwriting exemplar to the govt. Trial set for 3/21/77. (Limited to 3/21/77)	2/4/77 T
2-7-77		Certificate of engagement to atty filed setting case for trial 3-21-77.	3.18.77
3/17/77		Before CHR EIN, J - SUPERSEDING INDICTMENT FILED.	
3.18.77		Before Mishler, J.- Case Called. Case adjd. without date for Trial on the underlying indictment. 4.1.77 for pleading on the superseding indictment. Trial on the	3.19.77 P 5-25-77

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	(DOCUMENT NO.)	Initiation Date (a)	Substantive Date (b)	Ltr Code (c)	Total Days (d)
	continuation.....				
	Superseding indictment set down for 5.16.77.				
3-21-77	Letter and certificate of engagement filed setting case for trial on May 16, 1977				
3-30-77	Writ ret'd and filed - executed.				
4.1.77	Before Mishler, J.- Case Called. Deft. & Counsel present. Deft. arraigned and enters a plea of not guilty on his own behalf. 5.16.77 for Trial. Same bail conditions.				
5.16.77	Before Mishler, J.- Case Called. Deft. & Counsel present. Motion to suppress argued and denied. Trial ordered and begun. Jurors were selected and sworn. Trial continued to 5.17.77 at 10:00 A.M.				
5/17/77	Before Mishler, Ch J-case called-defts & counsel present trial resumed-defts waived opening statement-trial cont'd to 5/18/77.jlj				
5-18-77	Before Mishler, Ch J - case called - deft & counsel Philip Katowitz of Legal Aid present - trial resumed - trial cont'd to 5-19-77 at 9:30 am.				
5-19-77	Before Mishler, Ch J - case called - trial resumed - trial cont'd to 5-23-77.				
5-23-77	Before Mishler, Ch J - case called - trial resumed - motion for dismissal argued and denied - trial cont'd to 5-24-77/				
5.24.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				
5/24/77	Before Mishler, Ch J-case called-deft & counsel present except for the deft Savino-trial resumed-both sides rest-motion for a judgment of acquittal denied trial cont'd to 5/25/77.jlj				
5-25-77	6 volumes of transcripts filed (pgs 1 to 1275)rs.				
5-25-77	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - Marshals sworn - at 11:35 am the Jury retired for deliberations - at 2:40 PM the jury returned and rendered a verdict of guilty on counts 1 and 2 - jury polled - jury discharged - trial concluded - bail cont'd., as to all defts - motions reserved until time of sentence sentence adj'd without date - Memorandum of Verdict filed.				
5-25-77	By Mishler, Ch J - Order of sustenance signed for lunch (16 persons)				
5.27.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				
7-15-77	Before Mishler, Ch J -case called - deft & counsel Philip Katowitz present - deft is sentenced to imprisonment for 2 years on count 2 under 18:4205(b)(2) - sentence to run consecutive to the sentence imposed in the Dist. of New Jersey. Imposition of sentence is suspended on count 1 and deft is placed on probation for 5 years to commence at				

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

E

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	(Document No.)	(a)	(b)	(c)	(d)
	the expiration of the sentence imposed on count 2. Clerk is to file notice of appeal without fee. On motion of AUSA Corcoran, ^{1st} superseding indictment and underlying indictments are dismissed.				
7-15-77	Judgment and commitment and order of probation filed - certified copies to Marshal and probation.				
7-15-77	Notice of appeal filed (no fee) docket entries and duplicate of notice mailed to the court of appeals.				
8-8-77	Judgment & commitment ret'd and filed - copy to accompany def't to Danbury, Conn.				
9-6-77	Scheduling order filed that the record on appeal be docketed on or before 9-12-77				
9.12.77	Supplemental Record on Appeal certified and hand delivered to the Court of Appeals by Joan Gill.				gp

A TRUE COPY
ATTEST
DATED 9-12 19 77
LEWIS ORGEL
CLERK
BY [Signature]
DEPUTY CLERK

TRP:PFC:cj
F.#771,329

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA

-against-

VINCENT JAMES SANTA, also known
as "Jimmy Santa", JOHN SAVINO,
JOSEPH DeLUCA, JAMES DeFILLIPO,
PATRICK DeFILLIPO, also known
as "Paddy DeFillipo" and
MANUEL GOMEZ,

Defendants.

----- x

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 11th day of March, 1975,
and the 13th day of March, 1975, within the Eastern District of
New York, the defendants VINCENT JAMES SANTA, also known as
"Jimmy Santa", JOHN SAVINO, JOSEPH DeLUCA, JAMES DeFILLIPO,
PATRICK DeFILLIPO, also known as "Paddy DeFillipo." and MANUEL
GOMEZ, did wilfully and unlawfully receive and have in their
possession approximately Six Thousand Nine Hundred and Ten (6,910)
cartons of Schick Company products, having a value in excess of
One Hundred Dollars (\$100.00), which goods had been stolen from
a Time - D.C. Trucking Corporation truck bearing California lic-
ense plate number WY 6336, while moving as part of and constituting
an interstate shipment of freight from West Haven, Connecticut to
Anaheim, California, the defendants knowing the same to have been
stolen. (Title 18, United States Code, Section 659).

COUNT TWO

On or about and between the 10th day of March, 1975 and
the 19th day of March, 1975, both dates being approximate and
inclusive, within the Eastern District of New York, the defendants
VINCENT JAMES SANTA, also known as "Jimmy Santa", JOHN SAVINO,
JOSEPH DeLUCA, JAMES DeFILLIPO, PATRICK DeFILLIPO, also known as
"Paddy DeFillipo" and MANUEL GOMEZ, together with others not named
herein, did knowingly, wilfully and intentionally combine, con-
spire, confederate and agree to commit an offense against the

SUPERSEDING INDICTMENT

Cr. No. 71CR326
(T. 18, U.S.C. §659)

FILED

IN CLERK'S OFFICE

U. S. DISTRICT COURT E.D. N.Y.

★ MAR 17 1977 ★

TIME A.M.

P.M.

United States in violation of Title 18, United States Code, Section 659 and Section 2, in that they did knowingly and wilfully conspire to receive and have in their possession, approximately Six Thousand Nine Hundred and Ten (6,910) cartons of Schick shaving products having a value in excess of One Hundred Dollars (\$100.00), which goods were stolen from a tractor trailer while moving as and constituting an interstate shipment of freight from West Haven, Connecticut to Annaheim, California.

In furtherance of the said conspiracy and to effect the objectives thereof, the following overt acts, among others were committed within the Eastern District of New York:

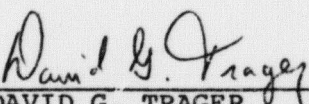
O V E R T A C T S

1. On March 10, 1975, the defendant MANUEL GOMEZ rented a 1975 Plymouth Fury from National Car Rental Systems, 160-14 Hillside Avenue, Jamaica, New York.

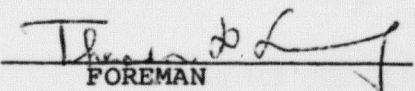
2. On March 12, 1975, the defendants VINCENT JAMES SANTA, also known as "Jimmy Santa", JOHN SAVINO, JOSEPH DeLUCA, JAMES DeFILLIPO, PATRICK DeFILLIPO, also known as "Paddy DeFillipo" and MANUEL GOMEZ did have in their possession approximately Six Thousand Nine Hundred and Ten (6,910) cartons of Schick shaving products which they placed in CBS and S & F Warehouses in Brooklyn, New York.

3. On March 13, 1975, the defendants VINCENT JAMES SANTA, also known as "Jimmy Santa", JOHN SAVINO, JOSEPH DeLUCA, JAMES DeFILLIPO and PATRICK DeFILLIPO, also known as "Paddy DeFillipo" met at 114-33 Lefferts Boulevard, Queens, New York and discussed the seizure of the Schick products by the Federal Bureau of Investigation. (Title 18, United States Code, Section 371).

A TRUE BILL.



DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK



FOREMAN

No. _____

UNITED STATES _____ **DISTRICT COURT**

Eastern _____ **District of** **New York**

CRIMINAL _____ **Division**

THE UNITED STATES OF AMERICA

vs.

VINCENT JAMES SANTA, ET AL.

Defendants.

INDICTMENT

T. 18, U.S.C, §659

A true bill,

Thomas D. Long
Foreman.

Filed in open court this _____ **day**
of _____, **A. D. 19** _____

Clerk.

Bail, \$ _____

PAUL F. CORCORAN, AUSA 902-482
330- 7070

8 THE COURT: All right. I think we are ready
9 to start now. The sheet on your seats that you now
10 have in your hand, described as memorandum of verdict,
11 is just a synopsis of what the charges are and a list
12 of the defendants that you can keep in mind of what
13 the charges are and who the defendants are and try to
14 relate the evidence in the case to the defendants.
15 In effect, you will have 10 trials in one. Each defendant
16 charged with two crimes and five defendants. You have
17 to measure the evidence in the case against each
18 defendant against each charge. I will read the charges
19 in the indictment and that's the charges and
20 hopefully the synopsis will remind you of what the charge
21 is. For the moment, you can set it aside and listen
22 to what I have to say about the applicable law.

23 In every jury trial, we must first understand and
24 recognize the role that each participant in the trial
25 plays. A jury trial is called an adversary proceeding.

1
2 It is called an adversary proceeding because the
3 Government is on one side of the issues and the defendants
4 are on the other side of the issue and we talk about
5 fact issues. When we talk about fact issues, we mean
6 determination as to what happened. The jury, and the
7 jury alone is the sole judge of the facts and the jury
8 and the jury alone determines what happened from
9 conflicting evidence. When I refer to defendant or
10 defendants, I mean the same thing. It is either the
11 defendant collectively or the defendants in the plural.
12 And if I intend to charge with relation to a single
13 defendant, I will point that defendant out and say that
14 this affects only the one defendant. Otherwise, assume
15 that the charge relates to all of the defendants.

16 You recognize, of course, that lawyers are in
17 a different position than the Court or the jury. The
18 lawyers are protagonists and they represent the positions
19 of the clients. They are really conduits, transmitting
20 to the jury the position and the arguments that their
21 clients make and as protagonists, of course, at times
22 they become zealous in promoting the cause and that is
23 as it should be. A lawyer works effectively when he
24 is dedicated to his client's interests and sponsors
25 those interests forcefully. And so, during this trial,

1
2 we have had few instances where argument was made and
3 where I might have even given a slight reprimand, but,
4 as one of the lawyers indicated, you are not deciding
5 which lawyer is doing the better job and this is not
6 a popularity contest where you will decide which lawyer
7 is most attractive either in appearance or even in the
8 method of presentation. It is the client's interests
9 that are involved here and they should not be judged
10 by either an attractiveness of the lawyer or a rejection
11 or disagreement in the manner in which he conducts
12 himself.

13 I found nothing that was particularly improper
14 in the conduct of the lawyers on either side. During
15 the course of the trial I made decisions in your
16 presence and it was not to indicate an attitude of the
17 Court or indication of the guilt or innocence of any of
18 the defendants. It is not my business to decide the
19 case. My job here is solely to advise you as to the
20 applicable law and during the trial to decide the issues
21 raised as matters of law and decide them solely as
22 questions of law. Don't resent any particular lawyer
23 or client because that particular lawyer took a number
24 of objections. Again, he has a duty to make objections
25 when he believes the question is improper or something

1
2 that happens in the court is improper and it is my
3 duty to pass on it.

4 As between the Court and the jury, as I said,
5 we are both judges and each has a clear line of authority
6 and it is clearly demarked, the jury being the sole
7 judge of the facts and the Court being the sole judge
8 of the law. You and you alone will decide what happened
9 in the critical issue, from what I heard in the summations
10 whether it was these defendants that participated in
11 the alleged crime of receiving and possessing goods
12 stolen in interstate commerce and whether it was done
13 knowingly.

14 There are a number of intermediate issues which
15 you will decide, but those are the main issues in this
16 case. Just as you are the sole judges of the facts
17 and just as I have the obligation of respecting your
18 determination, your decision on what happened, so you
19 have the obligation of accepting the law as I charge it
20 even though you disagree with it.

21 The law is uniformly applied. Every judge is
22 expected to charge the law in substantially the manner
23 in which I do in this case and every jury is expected
24 to accept the law as the judge charges it and that makes
25 for stability and predictability and fairness. That is

1
2 what we mean by uniform application. So, even if you
3 do not like a particular principle and even though you
4 feel that you could have done a better job in fashioning
5 a law, you, nevertheless as jurors have the obligation
6 of accepting the law as I charge it. And so, if each
7 one understands the role that is cut out for them in
8 a jury trial, it again makes for a fairer trial.

9 We start with the presumption of innocence. As I
10 told you before, the presumption of innocence is a strong
11 presumption in our law. It means that you must conclude
12 at the outset that all of the defendants are innocent
13 of both charges in this indictment. That conclusion
14 is sustained throughout the trial and throughout your
15 deliberations, and is enough to acquit the defendants.
16 It is only when the Government proves the guilt of the
17 defendant by proof beyond a reasonable doubt that the
18 presumption is overcome.

19 I like to analogize the principle to what we call
20 a Scotch verdict. You have heard the term Scotch
21 verdict. In Scotland we have three verdicts, guilty,
22 not guilty and not proved. In this country we have two
23 verdicts, guilty and not guilty. Not guilty includes
24 not proved. So we talk about a verdict of not guilty
25 and we talk in essence of a verdict not proved.

1
2 What is a reasonable doubt? A reasonable doubt
3 is the kind of doubt a reasonable person would have
4 after reviewing all of the evidence in the case. It
5 is a doubt based on reason and common sense and your
6 experience as distinguished from a vague, speculative
7 or imaginary doubt. It is not the kind of doubt that
8 might arise from a juror's distaste from performing
9 an unpleasant task. A reasonable doubt is the kind of
10 doubt that would make a reasonable person hesitate to
11 act in a matter important to himself or herself. Proof
12 beyond a reasonable doubt is therefore proof of such
13 convincing character that you would be willing to rely
14 and act upon it unhesitatingly in the most important of
15 your own affairs.

16 The Government's burden is not to prove that
17 every bit of evidence that is offered during the trial
18 is true beyond a reasonable doubt. The Government's
19 burden is heavy, but it refers to the essential elements
20 of the crime charged and the Government's burden is to
21 prove all of the essential elements of the crime charged
22 beyond a reasonable doubt. The defendants do not have
23 to prove their innocence. On the contrary, the defendants
24 are presumed to be innocent and they are not required
25 to offer any evidence.

1
2 The case is not to be decided on the number of
3 witnesses called by each side or the number of exhibits
4 introduced into evidence but rather on the quality of
5 the evidence in the case.

6 Now, what is the evidence? Evidence is the
7 sworn testimony given by the witnesses, both the direct
8 and cross-examination, the exhibits that are marked in
9 evidence, and there is a difference between an exhibit
10 marked in evidence and one marked for identification.
11 As I recall, I explained that to you at the outset of
12 the trial.

13 Every once in a while during deliberation the
14 jury will ask me to send in a certain exhibit that was
15 marked for identification. It only becomes evidence when
16 it is marked in the case as an exhibit. Identification
17 only means that someone who might later read the record
18 might want to know what the witness was talking about.
19 They would say, "Oh, there was a certain document marked
20 for identification--" that will give me the document.
21 But for your purposes it is only what is in evidence that
22 can be considered.

23 There were some stipulations entered into between
24 the Government and the defendants and that is part of
25 the record and of course the facts which the Court

1
2 judicially noticed. On occasion I may have said
3 December 2nd, 1974, was on a certain day of the week.
4 That is a fact judicially noticed. All of that is the
5 evidence in the case. Upon the evidence and the facts
6 established by the evidence and the inferences that may
7 be reasonably drawn from those facts, based on your good
8 common sense and experience, you will arrive at the
9 verdict of guilty or not guilty. It is always helpful
10 to tell the jury what is not evidence in the case.
11 Statements made by counsel in their opening addresses
12 is not evidence in the case. It is a helpful device
13 that alerts the jury of the evidence that is to come
14 into the case. And so, hopefully, the jury will find
15 it easy to understand the evidence that comes into the
16 case.

17 (Continued on next page)
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THE COURT: (Continuing.)

The statements made by counsel in summation is not evidence. Summation is designed to offer theories on the part of the Government of inculpability which means theories of guilt, and on the part of defendants, theories of exculpability, which means theories which show that the Government has failed to prove guilt beyond a reasonable doubt.

Obviously you could not accept all the theories and they are offered only because you may find that something that the lawyers said makes sense, and you may consider it and even adopt it.

Statements that the Court may have made during the trial is not evidence. If I happen to say something, do not consider it as evidence. I am not sworn. I am not subject to cross-examination as witnesses are. While I am at it, I might say that you should not attach any special significance to the questions that the Court asked, because I asked them only if I thought there was some confusion in the minds of the jury as to a certain subject. The confusion may have only been in my mind, in that event the question was quite useless. But that was the only purpose in the Court asking questions.

At times, objections were sustained to questions

1
2 that were asked. You may not speculate on what the
3 answer might have been, had the witness been permitted
4 to answer. Evidence was stricken from the record as
5 I directed the Court reporter to strike it from his
6 notes, so you are directed, figuratively, to strike
7 it from your mind and memory, the theory again being
8 it did not get into the record, and since it is not
9 in the record, you may not consider it.

10 At times, the lawyer on cross-examination,
11 incorporated a statement, assuming a certain fact to
12 be so, and asked the witness whether it was so. Well,
13 if it is not otherwise supported in the record, you
14 may not consider that fact as true. For example, in
15 one of the questions, one of the lawyers asked the
16 witness whether it was not true that he had told Mr.
17 Sabillius, or a name something like that, that he
18 would get even with one of the defendants. The wit-
19 ness said, no, he never said that. Well, cross-
20 examination is a tool for revealing the truth and the
21 tools that are used are designed to do it, but do not
22 necessarily perform the task with every question. As
23 I say, it was a proper question, but once the witness
24 said, no, it didn't happen, never said it, you may
25 not assume the contrary unless there is evidence

3

Charge of the Court

in the record otherwise, outside that question, that supports the assumed fact.

I charged you that the defendants in this trial are only required to defend the charge in the indictment. If evidence comes in that other criminal activity took place, that is probably for another court, maybe another jury, but has nothing to do with this case except, and this is the narrow exception, where there is evidence of other prior similar crimes, or other similar criminal activity, that evidence may be offered to identify the defendants charged in the crime before you and may be offered to show criminal intent.

In this case there was proof, and as a matter of fact, a judgement of conviction, convicting all the defendants except the defendant, Manuel Gomez, and you will decide first whether the method of operation in the other crime was similar to that charged here.

Now, I caution you that that judgement of conviction is presently on appeal. If you find that that the crime is similar and there is some evidence in the case, some credible evidence that these defendants were involved in the crime charged here, you may use evidence of the prior, similar crime to determine whether

Charge of the Court

4 1
2 the Government proved beyond a reasonable doubt, that
3 it indeed was one or more of the defendants named,
4 but again, I exclude from that charge the defendant
5 Manuel Gomez.

6 If, from all of the circumstances in the case,
7 there is some evidence that the defendants charged,
8 again excluding Manuel Gomez, knew that the merchan-
9 dise was stolen, again, you may use evidence of a
10 prior, similar crime to determine whether the Govern-
11 ment proved beyond a reasonable doubt the element of
12 criminal intent, and by that I mean that the defend-
13 ant, that the accused knew that the merchandise was
14 stolen.

15 Now, the one thing you may not do is decide
16 that because the defendants committed a prior, similar
17 crime that they are guilty of that crime and there-
18 fore must be guilty of this one. That would not be
19 fair. There must be evidence in this case to tie it
20 in with the prior, similar crime.

21 What is evidence? Evidence is the method by
22 which a disputed fact is proved or disproved. There
23 are two general classifications of evidence. One is
24 direct evidence, which is the testimony of a witness
25 of what that witness saw or heard as to a disputed

Charge of the Court

fact.

Circumstantial evidence, on the other hand, is a method of proving or disproving a disputed fact by the jury drawing fair and reasonable inferences based on good common sense and experience from established facts.

Now, each time I charge a jury on that definition, there is something of a blank expression on their faces, and I could not say that I blame them. So what I do, I give an example. I take a hypothetical situation to demonstrate the difference between direct and circumstantial evidence.

If you were sitting here in a personal injury case and you learned that Mrs. A. was suing Mr. B. on a claim that Mr. B. was driving his motor vehicle at a certain time or place, and at that place there was a stop sign, but Mr. B. failed to stop, and he continued past the stop sign and struck Mrs. A., I think I could demonstrate the difference between direct and circumstantial evidence.

Assume in a hypothetical case that my courtroom deputy, Mr. Adler, had his back to the roadway and his back to the stop sign so he could not see it, but I was facing the roadway and facing the stop sign, and

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Charge of the Court

1 on the particular day I saw Mr. B's 1977 white
2 Cadillac through the corner of my eye traveling at
3 70 miles an hour, and I saw him pass the stop sign
4 and strike Mrs. A. I would be able to give direct
5 testimony on that issue. First you must identify the
6 issue. The plaintiff says the defendant did not stop
7 at the stop sign. The defendant says, yes, I stopped
8 at the stop sign and then I proceeded. If Mr. Adler
9 were called to the witness stand, he could not give
10 direct testimony as I indicated, but he could testify
11 on the surrounding circumstances from which the jury
12 could draw an inference that the motor vehicle passed
13 the stop sign without stopping.
14

15 He might say that while he was talking with me
16 he noticed the motor vehicle, Mr. B's 1977 Cadillac,
17 traveling at about 70 miles an hour, he turned around
18 after it had traversed about 150 feet, the period
19 during which he did not see the car, and saw it again
20 two or three seconds later traveling at the same speed
21 and struck Mrs. A.

22 I think from those circumstances, if you believe
23 his testimony, establishing that the motor vehicle
24 traversed about 150 feet in two or three or four
25 seconds, that that motor vehicle could not have stopped

Charge of the Court

and then proceed. So, therefore, you have the same issue of fact on which there is both direct and circumstantial evidence.

The law does not hold that one form of evidence is a better quality than the other. The law requires the Government to prove guilt of the defendant by proof beyond a reasonable doubt both on direct and the circumstantial evidence.

I have used the term inference and I have used the term presumption. An inference is a conclusion which reason and common sense lead the jury to draw from the facts which have been established by the evidence in the case. The jury may draw an inference and the example of that is the inference you may draw under circumstantial evidence.

Presumption, on the other hand, is a conclusion which the law requires the jury to make and continues only so long as it is not overcome or outweighed by evidence to the contrary. But unless and until ~~the pre-~~sumption is so outweighed, the jury is bound to find in accordance with the presumption, and the example of that is, of course, the presumption of innocence.

You, the jurors, are the sole judges of the credibility of the witnesses, which means the

Charge of the Court

believability of their testimony and the weight their testimony deserves. Scrutinize the testimony given and the circumstances under which each witness testified and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence; consider his or her state of mind and the motive that the witness has for testifying; that means the reason the witness is testifying; the state of mind means what the witness is thinking of as he testifies on the witness stand; the demeanor and the manner while on the witness stand, is the witness answering fully and fairly, is the witness attempting to evade in answering the question. Take into consideration the witness's own ability to observe the matters as to which he has testified, whether he shall have impressed you as having an accurate recollection of these matters.

Take into consideration the relation each witness might bear to its side of the case; the manner, in which each witness might be affected by the verdict; the extent, if at all, the witness's testimony is corroborated or contradicted by his own testimony or other testimony in the case.

The law does not compel a defendant in a

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criminal case to take the stand and testify. No
presumption may be raised and no adverse inference
can be drawn in the failure of the defendant to testify.

(Continued on next page.)

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THE COURT: (Cont'g.) The defendant, as previously charged, may rely on the failure of the Government to prove its case. It would be improper for you to discuss the failure of the defendant to testify during your deliberations.

We had expert testimony in this case. Mr. Delaney testified as an expert on questioned documents, or as commonly called, handwriting expert.

Normally, a witness may not testify as to his or her opinion or conclusions, but the exception is expert testimony. Where one, through experience, education has become an expert in some art or science or calling, he may state an opinion as to relevant material matter in which he professes to be an expert and may also state the reason for the opinion.

But you should not accept the expert's opinion at face value. His testimony, too, should be carefully scrutinized by you and it should be tested by all the guides that I indicated before. If you find his testimony incredible, you just reject it.

There is some evidence in the case that at some time a witness prior to the time he took the

stand made a statement that is not consistent with the testimony he gave before you. It is called impeaching evidence.

There are times when variations in the retelling of a version of an event lends credibility to testimony. You would not expect someone to repeat what happened word for word, pause for pause and gesture for gesture. If a witness did that, you would have reason to suspect the truthfulness of the testimony.

So, there are variations we can expect. There are certain inconsistencies that challenge the credibility of the testimony. You determine the circumstances under which the witness gave the previous statement. You determine whether the statement is inconsistent with the statement he gave before you. You determine whether it is a statement as to a material or an immaterial fact.

Then making those determinations, you determine the effect, if any, the inconsistent statement will have on his credibility.

There is proof that Mr. Cogar was convicted of a number of offenses. The testimony of a witness may be discredited or impeached by showing that the

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2 witness has been convicted of a felony. That is,
3 of a crime punishable by imprisonment for a term of
4 years.

5 Prior conviction does not render a witness
6 incompetent to testify but is merely a circumstance
7 which you may consider in determining the credibility
8 of the witness.

9 It is the province of the jury to determine
10 the weight to be given to any prior convictions as
11 impeachment.

12 The law does not prohibit an informer from
13 testifying. The use of informers who infiltrate
14 criminal activity or an area of criminal activity
15 is recognized as a proper means of investigation. The
16 testimony of an informer, however, who provides
17 evidence against the defendant for pay or for
18 immunity from punishment or for personal advantage
19 or vindication, must be examined and weighed by the
20 jury with greater care than the testimony of an
21 ordinary witness.

22 The jury must determine whether the informer's
23 testimony has been affected by interest or by
24 prejudice against the defendant.

25 Falsus in uno, falsus in omnibus, which means,

1
2 the rough translation, if the testimony is false
3 in one respect, it may be false entirely.

4 That means if a witness is shown to have
5 knowingly -- that means if he was aware -- to have
6 knowingly testified falsely concerning a material
7 matter, not just any matter, a material matter, you
8 have the right to distrust all such witness's
9 testimony or you may decide to accept such part of
10 it you think is credible.

11 That principle merely underscores the wide
12 discretion the jury has in weighing the credibility
13 of witnesses.

14 Something was said about the preparation of
15 witnesses before they take the stand. There is
16 nothing wrong in a lawyer reviewing the testimony
17 that the witness is to offer during the trial. What
18 the lawyer may not do is suggest to the witness what
19 he should testify to. That is improper.

20 But any lawyer worth his salt would not put a
21 witness on the witness stand without knowing at least
22 in a general way what the witness will testify to.

23 You heard the testimony of law enforcement
24 officers. As I instructed you during your selection,
25 every witness is to be tested by the guides that I

2 indicated to you and by others that you may think of
3 that dictates should be used with your good common
4 sense.

5 A law enforcement officer's testimony is not
6 to be credited simply because he is a law enforcement
7 officer.

8 I am about to read the indictment and here
9 you might look at the memorandum of verdict only so
10 that it will help you recall what was left out and
11 so that you recognize that this is just a synopsis.

12 First you must understand that the indictment
13 is merely the method of bringing a defendant to
14 court to answer charges. The allegations of the counts
15 are not to be considered by you as proof. Proof
16 comes through the mouths of witnesses, the exhibits
17 that are marked in evidence, the stipulations between
18 counsel and those facts judicially noticed.

19 You are not to attach any significance to the
20 fact that the indictment is brought in the name of
21 the United States. The prosecution and the defendants
22 are equals in this court. The obligations of the
23 prosecution and the rights of the defendants are not
24 to be reduced because the prosecution is by the
25 United States of America.

Every crime charged is based upon Congressional statute. Most of our federal law is codified. The charges in this indictment are based on Section 659 and Section 371 of Title 18.

I'll just read the pertinent parts of Section 659 just to show you how long the statute is, it is almost a page and a half. But I will read just the part that refers to this charge.

"Whoever steals or unlawfully takes, carries away from any motor truck or other vehicle, with intent to convert to his own use, any goods or chattels moving as or which are a part of or which constitute an interstate shipment of freight ..." commits one type of crime.

Now, none of these defendants are charged with the hijacking and there is no evidence whatsoever that they participated in the hijacking. It is the next paragraph that they are charged with violating.

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been stolen, commits the crime charged in this indictment."

I will read Count 1 and you will find some of

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2 the language taken from the statute and you will
3 find some of it repeated in the synopsis of Count 1.
4 Count 1 charges as follows:

5 "On or about and between the 11th day of
6 March, 1975, within the Eastern District of New York,
7 the defendants Vincent James Santa, also known as
8 'Jimmy Santa', Joseph DeLuca, James DeFillipo,
9 Patrick DeFillipo, also known as 'Paddy DeFillipo'
10 and Manuel Gómez, did wilfully and unlawfully receive
11 and have in their possession approximately 6,910
12 cartons of Schick Company products, having a value
13 in excess of \$100, which goods had been stolen from
14 a Time-D.C. Trucking Corporation truck bearing
15 California license plate number WY 6336, while moving
16 as part of and constituting an interstate shipment
17 of freight from West Haven, Connecticut to Anaheim,
18 California, the defendants knowing the same to have
19 been stolen. (Title 18, United States Code, Section
20 659)."

21 This is Count 1.

22 Count 2 is based on a different statute.

23 That is a conspiracy count. The conspiracy count is
24 a charge that they agreed to, entered into a business
25 or venture of receiving and possessing the same goods.

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2 That is a separate crime. As you will see, the
3 conspiracy statute will refer to any agreement by
4 two or more persons to commit any crime against the
5 United States or to defraud the United States.

6 While the substantive crime is a crime of a
7 specific section so some times we refer to substantive
8 crime and we refer to a conspiracy crime. The
9 conspiracy statute in pertinent part is as follows:

10 "If two or more persons conspire to commit
11 any offense against the United States, in any manner
12 or for any purpose, and one or more of such persons
13 do any act to effect the object of the conspiracy --",
14 the crime of conspiracy is completed.

15 In other words, it requires two or more persons
16 to agree to commit a crime and then an overt act,
17 which means a significant step, knowingly taken, to
18 effect the object of the crime, then the crime of
19 conspiracy is committed.

20 This is the way the conspiracy count reads:

21 "Count 2, On or about an between the 10th day
22 of March, 1975, and the 19th day of March, 1975, both
23 dates being approximate and inclusive, within the
24 Eastern District of New York, the defendants Vincent
25 James Santa, also known as 'Jimmy Santa',

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2 Joseph DeLuca, James DeFillipo, Patrick DeFillipo,
3 also known as 'Paddy DeFillipo' and Manuel Gomez,
4 together with others not named herein, did knowingly,
5 wilfully and intentionally combine, conspire,
6 confederate and agree to commit an offense against
7 the United States in violation of Title 18, United
8 States Code, Section 659 and Section 2, in that they
9 did knowingly and wilfully conspire to receive and
10 have in their possession, approximately 6,910 cartons
11 of Schick shaving products having a value in excess
12 of \$100, which goods were stolen from a tractor
13 trailer while moving as and constituting an interstate
14 shipment of freight from West Haven, Connecticut to
15 Annaheim, California."

16 "In furtherance of the said conspiracy and
17 to effect the objectives thereof, the following
18 overt acts, among others were committed within the
19 Eastern District of New York."

20 Overt Acts 1; On March 10, 1975, the defendant
21 Manuel Gomez rented a 1975 Plymouth Fury from
22 National Car Rental Systems, 160-14 Hillside Avenue,
23 Jamaica, New York.

24 On March 12, 1975, the defendants Vincent
25 James Santa, also known as "Jimmy Santa", Joseph DeLuca,

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2 James DeFillipo, Patrick DeFillipo, also known as
3 "Paddy DeFillipo" and Manuel Gomez did have in their
4 possession approximately 6,910 cartons of Schick
5 shaving products which they placed in CBS and S&F
6 Warehouses in Brooklyn, New York.

7 3; On March 13, 1975, the defendants Vincent
8 James Santa, also known as "Jimmy Santa", Joseph
9 DeLuca, James DeFillipo, also known as "Paddy
10 DeFillipo" met at 114-33 Lefferts Boulevard, Queens,
11 New York and discussed the seizure of the Schick
12 products by the Federal Bureau of Investigation.
13 (Title 18, United States Code, Section 371).

14 As I'll charge you later, the Government must
15 prove, in addition to the conspiracy, one of the
16 overt acts stated in the charge. But I will come
17 to those essential elements a little later.

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19 (Continued on next page.)
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THE COURT: (Continued)

Now, the interstate character of the property stolen is an essential element of this offense. The property must either be moving in, or be a part of an interstate shipment at the time of the theft. The Government does not have to prove that the defendants knew that the Schick products were moving in interstate commerce. But the Government does have to prove that they were in fact moving in, or were a part of an interstate shipment.

Property is in interstate commerce if its movements originate in one state and pass through another state. Section 659 of Title 18 provides as follows:

"To establish the interstate character of any shipment, the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which, and to which such shipment is made."

Prima facie evidence means sufficient evidence unless outweighed by other evidence in the case. In other words, waybills or bills of lading or other shipping documents such as invoices, if proved, are sufficient to show the interstate character of the shipment in the absence of evidence in the case which leads the jury to a different or contrary conclusion,

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and I charge you that there is no evidence in this case that indicates that the shipment was not interstate.

The Government must prove the following essential elements of the crime beyond a reasonable doubt.

One, the act of stealing or unlawfully taking or carrying away cartons of Schick Company products having a value of more than \$100 from a Time D.C. Trucking Corporation truck. In other words, the Government has to prove the hijacking.

Two, that at the time of doing such act or acts, the Schick Company products were moving as, or constituted part of an interstate shipment of freight as charged in the indictment.

Three, that the accused received, or had the goods in his possession knowing the same to have been stolen. The defendants have conceded that whoever was present at the CBS warehouse, that those individuals received and possessed the goods. The defendants, of course, denying that they were the individuals, and, of course, denying the element of criminal intent, knowing the same to have been stolen.

An act is done knowingly when done voluntarily.

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2 It is the kind of act that a person or individual
3 knows he is doing and knows that what he is doing is
4 contrary to law. The word "knowingly" is put into
5 the statute so that an innocent act does not come
6 within the proscription of the statute. It is not
7 an act which is done because of mistake or negligence.
8 The Government must prove that the act of receiving
9 and possession was done by the accused knowing and
10 understanding that the Schick Blades or Schick products,
11 rather, were stolen.

12 I told you that you may make a finding as to a
13 disputed fact by drawing inferences. One of the
14 inferences that you may draw is an inference of
15 knowledge from the possession of recently stolen
16 merchandise. Possession of property recently stolen,
17 if not satisfactorily explained, is ordinarily a
18 circumstance from which the jury may reasonably
19 draw the inference and find, in the light of
20 such circumstance shown by the evidence in the
21 case, that the person in possession knew the property
22 had been stolen.

23 Now, I charge you that the defendant is not
24 required to offer any proof, and, of course, that
25 right is not in conflict with that charge. You may

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search throughout the record and if you find that the possession of the goods is satisfactorily explained, then it is explained. But it must be in the record. Possession of property recently stolen, if not satisfactorily explained, is a circumstance from which you may draw the inference that the party in possession knew that the merchandise was stolen.

Of course, the term "recently" is a relative term and has no fixed meaning. Where the property is recently stolen depends on the time period between the theft and the possession, the nature of the property and all the other facts and circumstances shown in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

On the other hand, the shorter the period of time since the theft, the stronger the inference may be.

I read count two which was the conspiracy count, and I would like to explain the concept and theory of conspiracy. It is the agreement that the law condemns in a conspiracy charge, not the actual receiving or possession, but the combination of two or more who by

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Charge of the Court

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2 concerted action get together to accomplish an unlaw-
3 ful purpose. A conspiracy is a kind of partnership
4 in criminal purposes in which each member of the con-
5 spiracy becomes the agent of every other member.

6 Now, the mere similarity of conduct among
7 various persons, and the fact that they may have
8 associated with each other and may have assembled to-
9 gether and discussed common aims and interests, does
10 not necessarily establish proof of the existence of a
11 conspiracy.

12 On the other hand, the evidence in the case
13 need not show that the parties sat down and entered
14 into a formal agreement. Criminal conspiracies are
15 not usually organized in that fashion. What the
16 evidence in the case must show is that the members in
17 some way, or in some manner, or through some contrivance
18 positively or tacitly came to a mutual understanding
19 to try to accomplish the common and unlawful plan,
20 in this case, the plan being to receive and possess
21 the stolen merchandise.

22 (Continued on next page.)
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2 The proof must also show that thereafter at
3 least one of the conspirators performed an overt
4 act knowingly, to further the object or purpose of
5 the conspiracy, and one of the overt acts must be
6 one of those set forth in the indictment.

7 One may become a member of the conspiracy
8 without full knowledge of all the details of the
9 conspiracy.

10 On the other hand, a person who has no
11 knowledge of the conspiracy but happens to act in
12 a way which furthers some object or purpose of the
13 conspiracy does not thereby become a conspirator.
14 For example, if someone had some stolen property
15 on him and I was driving by in my car and he had
16 it inside in his pocket, and I had no knowledge
17 that he had stolen goods, and he said, "Would you
18 take me ten blocks down to a place," where he
19 intended to dispose of it, I would be helping that
20 conspiracy along, but that doesn't make me a
21 conspirator, because I had been unaware of the
22 purpose of driving him the ten blocks.

23 (Continued on next page.)
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2 On the other hand, if the party entered the
3 car and said, "Hello, there. You know, I have this
4 stolen mer handise, and I have a buyer ten blocks
5 down," and I then transported him ten blocks down,
6 I would be entering the conspiracy, because I would
7 be furthering an object, a purpose, of the
8 conspiracy.

9 Before you may find an accused or any other
10 person has become a member of the conspiracy, the
11 evidence in the case must show beyond a reasonable
12 doubt that the conspiracy was knowingly formed. In
13 other words, the parties to it were aware that
14 they were dealing in stolen merchandise and that
15 the defendant or other persons who are claimed to
16 have been a member willfully participated in the
17 unlawful plan with intent to further the purpose of
18 the conspiracy. In other words, the Government
19 must show that he actively participated and that
20 he knew that he received and possessed the goods,
21 intending to do it, knowing that it was stolen,
22 knowing that he had it, and deliberately and inten-
23 tinally possessing it and not just accidentally.

24 In determining whether a conspiracy existed,
25 the jury should take into consideration all the acts

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2 and declarations of all the alleged participants.
3 However, in determining whether a particular accused
4 entered into the conspiracy, you may only consider
5 that testimony of what that particular accused said
6 or did.

7 I charged you on the exception to the usual
8 rule of evidence that may be used against a particu-
9 lar accused. I said to you the general rule is that
10 a party is not held responsible for what anyone else
11 says or does. The exception, of course, is, as you
12 recall, in a conspiracy.

13 As I told you, the idea of a conspiracy is
14 that each conspirator, or partner, as we will call
15 them, is an agent of every other member of the
16 conspiracy, and one member may speak for all the
17 other members if he speaks during the term of the
18 conspiracy and if the purpose is to advance the
19 purpose of the conspiracy, in this case again
20 the receipt and possession of the goods.

21 But before we may charge any accused with
22 what somebody else said or did out of his presence,
23 the Government must prove beyond a reasonable doubt
24 that the conspiracy charged in the indictment existed
25 at the time and for the purposes states.

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2 (2) That the person who acts or speaks is
3 shown to be a member of the conspiracy by proof
4 beyond a reasonable doubt. Then that act or con-
5 versation is chargeable against any accused that you
6 find beyond a reasonable doubt knowingly and will-
7 fully entered into the conspiracy.

8 If you find all that, then any statement
9 made by any member of the conspiracy during the
10 term of the conspiracy and to promote the objectives
11 of the conspiracy, is chargeable against the accused
12 who you find knowingly and willfully entered into
13 that conspiracy.

14 The mere fact that the goods were recovered
15 here in no way affects your determination.

16 If you find all the elements of the crime have
17 been proven, and the act was complete, the mere
18 fact that the Government or the agents recovered
19 the Schick blades has nothing to do with a finding
20 of guilt or innocence of the defendants.

21 I think I indicated to you what an overt act
22 is. An overt act is an act that is knowingly
23 committed by one of the conspirators in an effort
24 to effect an object or purpose of the conspiracy.

25 The Government must prove the following four

essential elements of the crime charged:

(1) That the conspiracy described in the indictment was knowingly and willfully formed and existed at or about the time alleged for the purposes set forth;

(2) The accused knowingly and willfully entered into the conspiracy, being aware that it was for the purpose of receiving and possessing stolen goods;

(3) That one of the conspirators thereafter knowingly committed one of the acts set forth in Count 2; and

(4) That such overt act was knowingly committed in furtherance of the object or purpose of the conspiracy.

Now, you will shortly be excused to deliberate on the matter before you. Each juror must decide the case for himself or herself.

One of the lawyers summing up before you seemed to indicate that if it were eleven to one, you should hold out. I suppose I can accept that principle in a general way, if he meant hold out if your position is based on your understanding of the evidence; but no juror has the right to come into any jury room and take a position and refuse to

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2 discuss the case with his fellow jurors. The jury
3 process is a deliberating process; it is an exchange
4 of views based upon the evidence in the case.

5 If you have arrived at a tentative verdict,
6 and after argument you realize that your position
7 isn't consistent with a fair interpretation of the
8 evidence, then of course you should give it up and
9 make a determination that is consistent with the
10 evidence.

11 Each one should decide the case for himself
12 and herself, but that doesn't mean I am charging that
13 you must be intransigent in your views, refuse to
14 discuss your views and take an inflexible position
15 and insist on it. That is not deciding a case fairly
16 either.

17 On the other hand, it would also be improper
18 for any juror to refuse to really decide the case
19 for himself or herself, just being ready to go along
20 with whatever the majority decides. That isn't
21 right either.

22 Twelve separate verdicts, independently
23 arrived at through discussion and exchange of views
24 based upon the evidence, all in agreement as to what
25 the verdict should be.

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2 This doesn't mean that you should just give
3 up the verdict that you arrived at for the sake of
4 unanimity.

5 During your deliberations you may have reason
6 to communicate with the Court. Of course, you do
7 that through your foreman. All notes will come from
8 your foreman to the marshals and to me. When I get
9 your note, I will take it up with the lawyers. That
10 may take some time. If you like any of the
11 evidence read back, we have transcripts, and I will
12 have it read back to you.

13 If you want any of the exhibits, just ask
14 for them. If you want all of them, we will sent
15 all of them in.

16 When you have arrived at a verdict, I will
17 expect a note from the foreman saying that you have
18 arrived at a verdict. Don't tell me what the ver-
19 dict is.

20 During your deliberations don't tell me how
21 you stand at any particular time. Don't tell me
22 you're six to six, eight to four, ten to two, or
23 eleven to one. I'm not interested. I'm interested
24 only when you have a verdict. And don't disclose
25 what your verdict is, because the first time you

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2 will disclose it is when you come into court--
3 in open court -- and it will be reported on the
4 record. In that event, I will, in effect, use the
5 memorandum of verdict, and I will give the foreman
6 two copies, one you will sign, and I will ask in
7 effect "as to Count 1, how do you find the defendant
8 Vincent James Santa, guilty or not guilty?" And
9 I will go down the list.

10 "How do you find the defendant Joseph DeLuca?
11 Patrick DeFillipo? Manuel Gomez?"

12 When you render the verdict, I will turn to
13 Juror No. 2 and ask whether he heard the verdict
14 as rendered by the foreman, and if he says yes, I
15 will ask if that's his verdict, and I will go to
16 Jurors 3, 4, to Juror No. 12.

17 If all the verdicts rendered in open Court are
18 the same, then it becomes the verdict of the case and
19 not before.

20 At this point I think I will excuse the jury
21 for just a few moments. Don't start your delibera-
22 tions in the matter yet. I want to talk to the
23 lawyers, and then I will call you back into the
24 courtroom.

25 I know what you meant to say: there is nothing

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2 holy about these forms of memorandum of verdict.

3 You can use them for notes and write on them.

4 I just want one copy signed by the foreman and that
5 will be for the file. You can destroy them right
6 after you come to your verdict. If you don't,
7 I will.

8 The jury is excused.

9 (The jury leaves the courtroom.)

10 THE COURT: Mr. Corcoran, any exceptions or
11 objection?

12 MR. CORCORAN: Yes, your Honor. Just one
13 problem, and that is when you indicated to the jury
14 the parties have stipulated that the individuals
15 at the CBS warehouse were in actual possession.
16 I thought our agreement was more than that, that the
17 facts would indicate that the defendants were in
18 actual possession if you believe the witnesses.
19 That wouldn't include the Simco lot.

20 Mr. Santa and DeLuca were not at CBS.

21 If the jury believes the witnesses, they were
22 in actual possession before CBS. I think your
23 Honor's charge limited it--

24 THE COURT: I didn't think that they were
25 pleading guilty.

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2 MR. CORCORAN: Then I think we should have a
3 charge as to what actual possession is. Your Honor
4 seemed to indicate that only those people at CBS
5 would be in possession.

6 THE COURT: Then I'll have to give a charge
7 on actual and constructive possession. I thought some-
8 how the evidence showed that at one time or other all
9 the defendants were in actual possession.

10 MR. CORCORAN: Yes, at the Simco lot unloading
11 the truck, but not at CBS.

12 THE COURT: Suppose I say the defendants con-
13 cede that the parties who were unloading the truck--
14 they're at Simco -- at the Simco lot or CBS, were
15 in actual possession.

16 MR. MURPHY: I would object to that.

17 THE COURT: Then I will have to give a
18 charge on actual and constructive possession.

19 Anything further?

20 MR. QUAGLIAIA: Could we have one moment?

21 THE COURT: Did you want anything else,
22 Mr. Corcoran?

23 MR. CORCORAN: No, sir.

24 THE COURT: Aside from this, let me go down
25 and see if there is any other objection.

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2 Mr. Murphy, do you have any?

3 MR. MURPHY: Not at this time.

4 THE COURT: Mr. Katowitz?

5 MR. KATOWITZ: No, your Honor.

6 THE COURT: Mr. Addison?

7 MR. ADDISON: No, your Honor.

8 THE COURT: Mr. Quagliata?

9 MR. QUAGLIATA: No, your Honor.

10 MR. MURPHY: So it's fresh in my mind, what
11 is it that you will charge with respect to Simco?

12 THE COURT: I will say possession is actual
13 or constructive, that it could be joint or separate.
14 Actual possession is having dominion and control of
15 the item. Constructive is having the right to
16 possession. Even though you don't have actual
17 possession, that you have the right to demand
18 possession.

19 MR. MURPHY: With respect to my client, the
20 only evidence is at the Simco lot. I would request
21 if your Honor is going to incorporate the Simco lot
22 into the situation--

23 THE COURT: I won't do it unless you agree.

24 MR. MURPHY: If I do agree--

25 THE COURT: I would say that I was in error

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2 in saying that the defendants concede only those
3 at the CBS warehouse were in actual-- were in posses-
4 sion, so they have satisfied that element of the
5 charge. However, the defendants do say-- are ready
6 to concede that anyone who had possession at either
7 the Simco lot or CBS warehouse would be in possession.

8 MR. CORCORAN: I think in light of Mr.
9 Murphy's argument yesterday tat the Simco lot inci-
10 dent never occurred, I would prefer to have a charge
11 as to actual possession--

12 THE COURT: If there is no stipulation, then
13 I will give the charge. You don't have to make a
14 decision. Mr. Corcoran insists upon the charge,
15 then I'll have to give it.

16 Seat the jury.

17 Is there anything else besides that, gentlemen?

18 MR. MURPHY: I am going to object to the
19 constructive possession charge at this point in the
20 case. I believe all the evidence indicates actual
21 possession as to each and every defendant. I don't
22 believe there is any indication--

23 THE COURT: Mr. Murphy, the other side is
24 entitled to the actual or constructive possession
25 charge. They may find that he was in constructive

possession. I can't deny the Government that charge. I thought it was agreed upon, but I was mistaken. I mistakenly thought that everyone was at the CBS, that's why I said it, but I remember it now.

Is there anything in addition to that?

MR. QUAGLIATA: I don't believe so.

THE COURT: Thank you.

Seat the jury.

I'm going to excuse you for lunch about noontime, because that's when the lunch is scheduled to come in.

(Jury present)

THE COURT: The Government must prove beyond a reasonable doubt that the accused received and possessed the Schick blades.

Now, the law recognizes two kinds of possession, actual possession and constructive possession.

A person who knowingly has direct physical control over a thing at a given time is then in actual possession. I am now holding my glasses in my hand, having direct dominion and control over my glasses, I have actual possession.

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a

1
2 thing, either directly or through another person
3 or persons, is then in constructive possession.
4 If my glasses were being repaired, for example, at
5 my optometrist, and I said to my courtroom deputy,
6 "Get my glasses," until he actually takes possession
7 of them or I actually take possession of them, I have
8 constructive possession of my glasses.

9 The law recognizes also that possession may
10 be sole or joint. If one person has actual or con-
11 structive possession of a thing, possession is sole.
12 If two or more persons share actual or constructive
13 possession of a thing, possession is joint.

14 You may find that the element of possession
15 as that term as used in these instructions is present
16 if you find beyond a reasonable doubt that the accused
17 had either actual or constructive possession, either
18 alone or jointly with another.

19 Now, the last instruction shouldn't be over-
20 emphasized, it should be placed, if you can, in the
21 instructions in the place I should have given it,
22 when we talked about Count 1 and the requirement that
23 the Government prove knowing possession of the stolen,
24 or if you find the merchandise was stolen, of the
25 merchandise.

1 At this time I will have to excuse Alternates
2 Nos. 1 and 2. The jury is about to deliberate and
3 you may not deliberate with the other jurors.

4 You served a very useful function. In the
5 event that one of the jurors became sick or other-
6 wise couldn't continue, you would have substituted.
7 So you, Mrs. Ford, who were concerned about getting
8 back to work, you now go back to work with the thanks
9 of the Court. Your lunch has been ordered, and will
10 be delivered to you at about one o'clock. If you
11 will call at my chambers, your lunch will be delivered
12 to you.

13 THE CLERK: Report down to the Central Jury
14 Room.

15 (Alternate jurors leave the courtroom.)

16 THE COURT: Will the clerk please swear in
17 the marshals.

18 (Marshals sworn.)

19 THE COURT: I call your attention to the oath
20 that you took at the outset of this trial, and that
21 is to render a true and just verdict. That means a
22 verdict based upon the evidence in accordance with
23 the law, free of bias, prejudice or sympathy.

24 The jury is excused for deliberation on the
25 matter before them.

 (The jury leaves the courtroom.)

1 THE COURT: I appreciate your staying around,
2 and, as I said a few minutes before 12 I'll release
3 you.

4 MR. MURPHY: Before we are excused, may I take
5 an exception to your charge on constructive possession.

6 THE COURT: Yes. Will you please state the
7 basis.

8 MR. MURPHY: I take exception specifically
9 to the example that you used. It's my view that
10 that is not constructive possession.

11 THE COURT: What should I have said?

12 MR. MURPHY: I believe my interpretation,
13 existing dominion or control over something
14 within an area, just having control over it through
15 some interest that you have. The fact that your
16 deputy clerk has your glasses and is bringing them
17 to you, I don't believe in that instance-- I believe
18 that would constitute more of an agency.

19 THE COURT: You give me an example, and I'll
20 charge according to your example. Give me an example.

21 MR. MURPHY: Judge--

22 THE COURT: We don't play games here. I will
23 take your example if it's correct and give it to the
24 jury.

25 MR. MURPHY: May I confer with counsel?

1 THE COURT: Sure, go ahead.

2 I want the wives or friends of these defendants
3 to take seats in the far corner of the courtroom out
4 of the view of the jury in the event the jury comes
5 back.

6 (pause)

7 MR. MURPHY: As far as that is concerned, I
8 don't feel it would serve my interest or the interest
9 of anyone else to have the constructive possession
10 charge to the jury again. I think it is detrimental.

11 THE COURT: Do you want me to tell the jury
12 to disregard the example?

13 I want to be definite for the record so there
14 is no question if you go up on appeal, and the Court
15 of Appeals has said any number of times you can't
16 just say "objection" again and get away with it.

17 MR. MURPHY: It's not a question of saying
18 again "objection," it's a question I necessarily don't
19 want something that I don't feel is favorable to my
20 position or to my client, emphasized to the jury by
21 having it brought back to them again.

22 THE COURT: Do you want me to discard the
23 example that I gave them?

24 MR. MURPHY: No, I think that would also--

25 THE COURT: I think that takes care of Point 6

1 on appeal. You can't say--

2 MR. MURPHY: You missed Point 5.

3 THE COURT: I'm up to Point 6. All right.

4 Gentlemen, just hang around a little. I have
5 some other business here.

6 If they ask for exhibits, they usually ask for
7 them the first ten or fifteen minutes.

8 Are you taking care of the other case that
9 I called this morning?

10 We have a note. It's sooner than I expected.

11 "Provide us with all exhibits."

12 I want the lawyers to make sure that the
13 exhibits that are offered are proper, because there
14 was one exhibit on the fingerprints where we said
15 we'd excise something.

16 MR. CORCORAN: I took the car out.

17 THE COURT: Make sure that they're the
18 exhibits in evidence, and I'll just say if you're
19 satisfied that all the exhibits that are marked in
20 evidence are turned over to the marshal.

21 MR. KATOWITZ: What I'm wondering, if Mr.
22 Corcoran has no objection, I have placed paper clips
23 on pages 31 and 32 of Defendants Exhibit C, and
24 also I think pages 49 and 50 of Defendants' Exhibit D.
25 That is the Jameco book.

1 THE COURT: Any objection to that?

2 MR. CORCORAN: I have no objection to that.

3 MR. KATOWITZ: Fine.

4 For the record, I have Defendants' Exhibit C,
5 D, three documents, Defendants' E, Defendants' F
6 and G. Mr. Corcoran is turning over Defendants'
7 Exhibit H, the stipulation, 3500-1 is also a
8 defendants' exhibit.

9 MR. CORCORAN: Here, another defendants'
10 exhibit.

11 MR. MURPHY: Mr. Corcoran just handed to me B.
12 I'm not sure what A is.

13 THE CLERK: A for identification, it's the
14 property pass.

15 MR. CORCORAN: B, C, D, E, F, G and H, I have
16 all the exhibits.

17 THE COURT: Who is the woman in the second
18 row? Isn't it strange that she's never been in court
19 with the child? There must be an agency that rents
20 out children by the day, the strangest thing. It
21 happens all the time. It doesn't help, incidentally.
22 They might acquit the wrong one because they don't
23 know whose child it is, and maybe we should get five
24 more children. When the jury comes in, she'll have
25 to take the child out.

MR. ADDISON: She will, your Honor.

THE CLERK: Note from jury marked Court's
Exhibit 4.

(So marked)

Charge of the Court

1
2 THE COURT: If all the lawyers are satisfied
3 that all the exhibits that are about to be handed over
4 to the Marshal are in evidence and may be handed over
5 to them in the form in which they are presently in,
6 then I will say all the exhibits in evidence have been
7 handed over to the Marshal.

8 MR. QUAGLIATA: Agreed.

9 MR. CORCORAN: I have removed all the F.B.I.
10 tags from everything.

11 THE COURT: All right. You have done that.

12 MR. QUAGLIATA: Very good.

13 MR. CORCORAN: Yes. And the chart is also in
14 evidence and the blackboard I don't know what we will
15 do with that.

16 THE COURT: You took pictures of it?

17 MR. CORCORAN: The agents didn't leave the pictures
18 with me.

19 THE COURT: The chart can go in. If you insist,
20 I will send it in.

21 MR. KATOWITZ: I think if they wish it they can
22 ask for it.

23 THE COURT: I have another suggestion. If you
24 can simulate that, and you are willing that that go in,
25 I am willing that that go in, show, you know, the red

T 4 am
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mm/bw

1 markings that was made by -- well, I didn't know. Do
2 you want to do that? If you insist, I will send the
3 whole blackboard in. It is an exhibit.

4 MR. KATOWITZ: Your Honor, --

5 MR. CORCORAN: I don't want to get involved in
6 this.

7 MR. KATOWITZ: I think simulation can be
8 dangerous, however, if you wish we can leave it out.
9 If they specifically ask for it, we can send it in.
10 They have enough to work with right now.

11 THE COURT: All right. Gentlemen, I think I
12 can safely excuse you for lunch, because they have got
13 enough to go over and I expect you back about 1 o'clock.
14 Incidentally, I may have a lot of problems taking care
15 of this jury. I think I am going to start the other
16 trial in the other courtroom and there might be delays,
17 but let's hope they don't ask for reading too much
18 testimony.

19 MR. CORCORAN: May I be permitted to remain
20 in my office upstairs?

21 THE COURT: Sure. I am excusing everyone right
22 now.

23 MR. CORCORAN: I mean at 1 o'clock?

24 THE COURT: Sure, okay.

25 (Luncheon recess)

1
2 MR. CORCORAN: Your Honor do you want to hear
3 the testimony we suggest in response to this note?

4 THE COURT: I will just take the pages that
5 you say it is on. I will look at it and if I don't
6 think so, I will not give it to them. Now, I have
7 got other matters. Hold it please.

8 Exhibit Number 5 testimony. They want
9 Pollari upstairs in Di Simone overhearing Santa.
10 Downstairs in DeCandia's house quoting Santa.
11 Cogar overhearing Santa and something in dress shop.

12 MR. CORCORAN: Santa and Diamond.

13 THE COURT: Diamond in dress shop.

14 May we have two copies of memorandum of
15 verdict. That is Note 6. Will you give them two
16 extra copies Martin?

17 THE CLERK: Yes, your Honor.

18 THE COURT: One of the jurors has a headache.
19 Can we have Anacin? I directed the Marshal to give
20 them Anacin. The other one is twelve black
21 coffees with separate sugar and milk.

22 THE CLERK: Four jury notes are marked
23 Court's Exhibits 5 through 8.

24 THE COURT: All right now, give me the list
25 of pages. All right gentlemen, if you don't have

1 the pages I will go to the other case. I will be
2 back in an hour or so. This has been going on for
3 almost fifteen minutes. Now give me the list.

4 MR. CORCORAN: There is disagreement on what
5 testimony should be read to the jury.

6 THE COURT: Give me the disagreements. I will
7 decide that. I will not hear arguments on it. Seat
8 the jury.

9 MR. MURPHY: May I just give you the rest of
10 the list?

11 THE COURT: No.

12 MR. MURPHY: You only have what he has
13 decided.

14 THE COURT: Please be seated Mr. Murphy. I
15 will show you how we get things done here. I am not
16 going to bicker for hours over this thing.

17 (At this point the jury enters the courtroom.)

18 THE COURT: We will try to give you what you
19 asked for and nothing more. If during the reading I
20 see all twelve hands go up, which would indicate to
21 me that you have had enough that you heard what you
22 wanted, then I will stop. If not, I will continue
23 going. This is a version of what you want. You said
24 you want Pollari's testimony concerning upstairs and
25 De Simone overhearing Santa. Starting at Page 215,

1 Line 3 (reading testimony) I suspend on Line 14,
2 Page 216. I go to Page 219, Line 4 (reading
3 testimony). I suspend at Line 21 on Page 219. I
4 go to Page 225, Line 13.

5 (Reading testimony). I suspend at Line 22
6 on Page 232. I go to Line 24, Page 232. I just
7 eliminated one question. (Testimony read). I
8 suspend at Line 21 at Page 232.

9 That is part of the testimony. I will
10 discuss and see whether we can agree on the rest of
11 it.

12 (At this point the jury leaves the courtroom).

13 THE COURT: We're only on the first question,
14 what Pollari heard upstairs. We have not yet
15 reached the second one, downstairs, right?

16 MR. CORCORAN: That is the complete testimony
17 for the conversation that they first requested. The
18 next page is, we cited Page 191 related to the
19 second question on that note.

20 THE COURT: You are objecting to part of this
21 Mr. Murphy?

22 MR. MURPHY: I don't believe I objected to
23 any of that.

24 THE COURT: Then what was the disagreement?

25 MR. MURPHY: I believe it was, he has Line 9

1 through 12 on that. And Line 9 through 12 on 191,
2 is that correct?

3 THE COURT: That is right.

4 MR. MURPHY: Well I don't dispute that.

5 THE COURT: Then he has 695 Line 20 to 697
6 Line 17. 698 Line 25 to 699 Line 13. 730 Line 24
7 to 739 Line 31. Is there any objection to that?

8 MR. MURPHY: May I just --

9 MR. CORCORAN: My objection, your Honor, went
10 to that portion 730 to 739. I don't believe it is
11 responsive at all to the question that the jury is
12 asking. In fact, the testimony of those pages
13 relate not to any conversation at all, but to
14 Mr. Cogar's drug habit and generally, cross
15 examination and background by Mr. Murphy.

16 THE COURT: I am not going to permit that
17 testimony to come in because that is asking that
18 the whole record be reread. I won't do that. You
19 say that is on 730 Line 24?

20 MR. CORCORAN: To 739. I don't believe, unless
21 Mr. Murphy can show me in here that he actually
22 asked to relate any of the conversations, that the --

23 THE COURT: I get the picture. Seat the jury.

24 MR. MURPHY: Number 3 is your Honor going
25 to proceed onto that on Number 3?

1 THE COURT: Bring the jury in. I will read
2 the testimony. There is no question about it.

3 MR. MURPHY: Number 3 relates only to the
4 dress shop.

5 (At this point the jury enters the courtroom.)

6 THE COURT: Page 695 Line 20 (testimony read).
7 I suspend at Line 4 Page 696 and I go to Line 11 of
8 696.

9 (Continued on next page.)
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THE COURT: I suspend at Line 17 on Page 697.

2

I now go to 698, Line 25 -- 698, Line 20 --

3

Line 18.

4

(Testimony read.)

5

Line 24, Page 730, cross-examination of

6

Mr. Cogar by Mr. Murphy.

7

(Testimony read.)

8

I suspend on Line 3, on Page 732.

9

I now go to Line 5 on Page 734.

10

I suspend on Line 21 on Page 739.

11

The jury is excused --

12

MR. CORCORAN: I would ask your Honor to look

13

at Page 190, Lines 9 through 12, which I think relate

14

to the note.

15

THE COURT: Wait just a moment and I will see

16

if it is material or part of the question asked.

17

(Pause.)

18

I do not know whether this is the conversation

19

you wanted. If it is not, raise your hand or if you

20

recognize it is not.

21

Line 9, Page 190.

22

(Testimony read.)

23

I suspend on Line 13 on Page 191.

24

The jury is excused for deliberations on the

25

matter.

1 2

THE CLERK: List of pages directed to the
Court, marked Court's Exhibit 9.

2

3

MR. MURPHY: May I take an exception for the
record?

4

5

THE COURT: All right.

6

7

MR. MURPHY: I take an exception to your
readings with regards to the second question. I
believe it called for a conversation that took place
in the dress shop. Your Honor read them a conversa-
tion that took place in DeCadia's house.

8

9

10

11

THE COURT: You agree no juror raised his hand
and said that it was something that he did not want
to hear?

12

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MR. MURPHY: I will agree to that.

(Continued on next page)

HR fls. 15

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

AFFIDAVIT FOR A
SEARCH WARRANT

(T.18, U.S.C., §659)

PREMISES KNOWN AS CBS WAREHOUSE,
INC., A MULTI-STORY RED BRICK
BUILDING KNOWN AS BUILDING NO.
58 LOCATED AT THE FOOT OF 50th
STREET, BROOKLYN, NEW YORK

Defendent.

EASTERN DISTRICT OF NEW YORK, SS:

PATRICK F. COLGAN, being duly sworn, deposes and
says that he is a Special Agent of the Federal Bureau of
Investigation, duly appointed according to law and acting
as such.

Your deponent has reason to believe that there
is presently being concealed in the above-described pre-
mises a quantity of cartons bearing the name Schnick, Inc.,
with the Spec No. 02-40 on the said cartons which cartons
have been stolen from Interstate Commerce in violation of
Title 18, United States Code, Section 659.

The facts tending to establish the grounds for
the issuance for a search warrant for the above-described
premises are as follows:

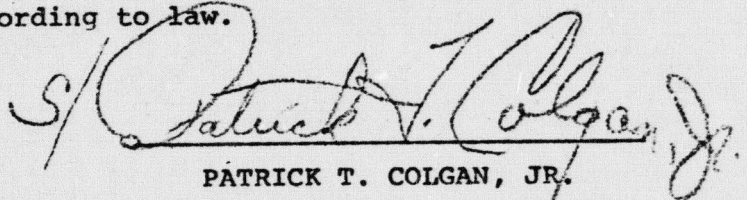
(1) A communication to the Federal Bureau of
Investigation from a Mr. James Lester, an employee of
Time-D.C. Trucking Corp., of Secaucus, New Jersey, that a
trailer owned and operated by Time-D.C. Trucking Corp.,
and bearing California License Plate No: UY6336 was hi-
jacked on March 11, 1975. Mr. Lester further advised
taking from the trailer 6,910 cartons of Schnick razors and
toilet products which cartons were being shipped from the
Schnick, Inc., West Haven Conn. to Anaheim, California.

(2) A reliable confidential informant, who has
previously supplied information to the Federal Bureau of
Investigation which information has resulted in the arrest
of one individual for the theft of approximately Seventy-

no recovery

Five Thousand Dollars (\$75,000) worth of stolen merchandise and who's information has also lead to the recovery of approximately Twenty-Five Thousand Dollars (\$25,000) worth of hijacked property and the arrest of two individuals in connection with that hijacking has stated, that he was in the above-described premises known as CBS Warehouse on March 12, 1975. While in the above-described warehouse the reliable informant observed several thousand cartons of Schnick super two bonded razors bearing the Schnick, Inc., Spec No. 02-40 on the cartons.

WHEREFORE, your deponent respectfully request that a search warrant be issued authorizing Special Agents of the Federal Bureau of Investigation to enter in day the premises known as CBS WAREHOUSE, INC., A MULTI-STORY RED BRICK BUILDING KNOWN AS BUILDING NO. 58 LOCATED AT THE FOOT OF 50th STREET, BROOKLYN, NEW YORK, and there to search and seize the above-described property to the end that the same may be dealt with according to law.


PATRICK T. COLGAN, JR.

Sworn to before me this
13 day of March, 1975.

VINCENT A. CATOGGIO

UNITED STATES MAGISTRATE
EASTERN DISTRICT OF NEW YORK

SECRET OF

— 17 —

[illegible]

Don't know.

BRIDGE DISTRICT OF NEW YORK, CO.

WITNESS J. SOLMAN, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

Your department has reason to believe that there is presently being concealed in the above-described premises a quantity of cartons bearing the name Reliance, Inc., with the Spec No. 62-43 on the said cartons which cartons have been stolen from Interstate Commerce in violation of Article 10, United States Code, Section 659.

The facts tending to establish the grounds for the issuance for a search warrant for the above-described persons are as follows:

(1) A communication to the Federal Bureau of Investigation from a Mr. James Foster, an employee of West-D.C. Hauling Corp., of El Centro, San Diego, that a trailer owned and operated by West-D.C. Hauling Corp., and bearing California license plate No. 1M5955 was hijacked on March 11, 1975. Mr. Foster further advised that the trailer, 910 contains at least 1000 bags and other products which contents were being shipped from the

Schnick, Inc., West Haven Conn. to Los Angeles, California.

(2) A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of one individual for the theft of approximately seventy-five thousand dollars (\$75,000) worth of stolen merchandise and who's information has also lead to the recovery of approximately twenty-five thousand dollars (\$25,000) worth of hijacked property and the arrest of two individuals in connection with that hijacking has stated, that he was in the above-described premises known as GRS Warehouse on March 22, 1975. While in the above-described warehouse the reliable informant observed several thousand cartons of Schnick super two bonded razors bearing the Schnick, Inc., Spec No. 62-40 on the cartons.

WHEREFORE, your department respectfully request that a search warrant be issued authorizing Special Agents of the Federal Bureau of Investigation to enter in day the premises known as GRS WAREHOUSE, INC., A THREE-STORY RED BRICK BUILDING KNOWN AS BUILDING NO. 56 LOCATED AT THE FOOT OF 50th STREET, BROOKLYN, NEW YORK, and there to search and seize the above-described property to the end that the case may be dealt with according to law.

Patrick V. Colgan Jr.

Shown to before me this
13 day of March, 1975.

VINCENT A. CATOGGIO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CERTIFICATE OF SERVICE

January 3, 1978

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Steven Hyl Barnett